

STATE OF MICHIGAN  
COURT OF APPEALS

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EDWARD DAVISON, Personal Representative of  
the Estate of SUSAN WORTHING, Deceased,

UNPUBLISHED  
September 6, 2007

Plaintiff-Appellant,

v

MCLAREN REGIONAL MEDICAL CENTER,  
GARY WEASE, M.D., JEFFREY GAUVIN,  
M.D., and GARY VERCRUYSSSE, M.D.,

No. 272454  
Genesee Circuit Court  
LC No. 05-082349-NH

Defendants-Appellees.

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Before: Fort Hood, P.J., and White and Borrello, JJ.

PER CURIAM.

In this wrongful death action alleging medical malpractice, plaintiff appeals as of right an order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7). We affirm, but for a different reason than the reason articulated by the trial court.

I. Facts and Procedural History

Susan Worthing (decedent) died on October 2, 2000, while she was a patient at defendant McLaren Regional Medical Facility and under the care of defendant doctors. On October 31, 2000, Jennifer Worthing (Worthing), the decedent's daughter, was appointed personal representative of the estate of the decedent. On October 29, 2002, Worthing filed a notice of intent to defendants, as required by MCL 600.2912b(1). In April 2003, Worthing filed a wrongful death complaint against defendants on behalf of her mother. Defendants moved for summary disposition under MCR 2.116(C)(7) based on *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), and the trial court granted the motion.

Thereafter, on August 25, 2004, the probate court appointed plaintiff as successor personal representative of the decedent's estate. On September 21, 2005, plaintiff filed a wrongful death complaint against defendants. Plaintiff did not file a notice of intent before filing the complaint. Defendants McLaren Regional Medical Center, Jeffrey Gauvin, M.D., and Gary

Vercruysse, M.D., moved for summary disposition, arguing that the trial court's dismissal of Susan Worthing's complaint rendered the matter res judicata.<sup>1</sup> In an order filed July 11, 2006, the trial court denied the motion. Defendants moved for summary disposition again, this time based on plaintiff's failure to file a notice of intent before filing his complaint. According to defendants, summary disposition was appropriate under MCR 2.116(C)(7) because plaintiff failed to comply with MCL 600.2912b(1).<sup>2</sup> In support of their motion for summary disposition, defendants relied primarily on this Court's opinions in *Verbrugghe v Select Specialty Hosp-Macomb Co, Inc*, 270 Mich App 383; 715 NW2d 72 (2006) and *Halton v Fawcett*, 259 Mich App 699, 704; 675 NW2d 880 (2003). In separate orders filed July 24, 2006, the trial court granted defendants' motions for summary disposition. According to the trial court, summary disposition was appropriate under *Verbrugghe* and *Halton* because plaintiff failed to file a notice of intent before filing his complaint.

## II. Standard of Review

This Court reviews de novo a trial court's ruling on a motion for summary disposition under MCR 2.116(C)(7). *DiPonio Constr Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 46; 631 NW2d 59 (2001). In deciding a motion made under MCR 2.116(C)(7), we consider all affidavits, pleadings, and other documentary evidence submitted by the parties. *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000). If the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred. *Id.*

The application of res judicata is also an issue of law that we review de novo. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999).

## III. Analysis

The threshold issue in this case is whether plaintiff, as a successor personal representative, could file a medical malpractice complaint without filing his own notice of intent, but instead rely on a notice intent filed by the deceased's initial personal representative. In *Braverman v Garden City Hosp*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (2007), a special panel of this Court recently determined that a notice of intent sent by a deceased's initial personal representative can support a complaint filed by a successor personal representative. Although the trial court's grant of summary disposition in favor of defendants based on plaintiff's failure to file his own notice of intent was improper in light of *Braverman*, we nevertheless conclude that the trial court properly granted summary disposition in favor of defendants based on the doctrine of res judicata.

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<sup>1</sup> Defendant Gary Wease, M.D., filed a separate "concurrence" in support of the other defendants' motion for summary disposition based on res judicata.

<sup>2</sup> Defendants McLaren Regional Medical Center, Jeffrey Gauvin, M.D., and Gary Vercruysse, M.D. moved for summary disposition pursuant to MCR 2.116(C)(7), and defendant Gary Wease, M.D., filed a separate, but virtually identical, motion for summary disposition under the same subrule.

In *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 414; 733 NW2d 755 (2007), our Supreme Court held on facts nearly identical to the facts in the present case that a successor personal representative of a decedent's estate was barred from filing a subsequent wrongful death complaint by the doctrine of res judicata when the first personal representative filed an identical wrongful death action that was involuntarily dismissed based on statute of limitations grounds. In *Washington*, the decedent died, and her brother was appointed personal representative of her estate. *Id.* at 415. The brother served the defendants with a notice of intent and subsequently filed a wrongful death medical malpractice action against the defendant hospital and others. *Id.* The trial court granted the defendants' motion for summary disposition under MCR 2.116(C)(7), ruling that the brother filed his complaint after the expiration of the period of limitations. *Id.* Subsequently, a successor personal representative was appointed, and she filed an identical wrongful death action against the defendants. *Id.* The defendants moved for summary disposition, arguing that the plaintiff's lawsuit was barred by res judicata, and the trial court granted the motion. *Id.* at 415-416. Our Supreme Court ruled that "because the trial court's involuntary dismissal of the initial personal representative's wrongful death suit operates as an adjudication on the merits under MCR 2.504(B)(3), plaintiff's claims were properly dismissed on the basis of res judicata." *Id.* at 417.

Similarly, plaintiff's claims in the present case are also precluded under the doctrine of res judicata. A claim is barred by res judicata when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first case. *Id.* at 418. In the present case, the initial personal representative's case was dismissed with prejudice based on statute of limitations grounds. The initial personal representative appealed to this Court, and this Court recently affirmed the trial court's grant of summary disposition in favor of defendants. *Worthing v McLaren Regional Medical Ctr*, unpublished opinion per curiam of the Court of Appeals, issued August 7, 2007 (Docket No. 258041). The trial court's involuntary dismissal of the initial personal representative's complaint based on statute of limitations grounds was an adjudication on the merits of the initial personal representative's claims under MCR 2.504(B)(3). *Washington, supra* at 414, 419. In addition, both the initial personal representative and plaintiff were in privity because they represent the same legal entity, the decedent's estate, and they were both pursuing the estate's cause of action against defendants for medical malpractice. *Id.* at 422. Finally, because plaintiff's complaint, like the initial personal representative's complaint, was a wrongful death medical malpractice complaint involving the decedent, the same operative facts supported both claims. Therefore, the matter in plaintiff's case could have been resolved in the initial personal representative's case. *Id.* at 420.

In sum, because all three elements of res judicata have been satisfied, plaintiff's complaint is barred under the doctrine of res judicata. In light of *Washington*, the trial court erred in denying defendants' motion for summary disposition based on res judicata. In light of *Braverman*, the trial court erred in granting defendants' motion for summary disposition based on plaintiff's failure to file a separate notice of intent. Therefore, we affirm the trial Court's grant of summary disposition in favor of defendants under MCR 2.116(C)(7), although for a different reason than that articulated by the trial court.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Helene N. White

/s/ Stephen L. Borrello